

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 7, 2006 Session

**WILLIAM B. McCULLEY and JEAN McCULLEY, n/o/k and
Administrators of the Estate of ROBIN McCULLEY, v. DR. BRIAN
GARBER, M.D.**

**Direct Appeal from the Circuit Court for Knox County
No. 1-279-03 Hon. Dale C. Workman, Circuit Judge**

No. E2005-01606-COA-R3-CV - FILED APRIL 20, 2006

In this action based on defendant's alleged medical malpractice, the Trial Court granted defendant summary judgment on the grounds the statute of limitations had run on the claim. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

Brandon K. Fisher, Clinton, Tennessee, for appellants.

Robert M. Stivers, Knoxville Tennessee, for appellee.

OPINION

Plaintiffs, as next of kin and administrators of the estate of Robin McCulley, brought this action against Dr. Brian Garber, alleging medical malpractice in defendant's treatment of Robin McCulley.

The Complaint states that McCulley died on January 13, 2002, after battling crohn's disease, that she had been treated by Dr. Wray for more than a year prior to her death, and that she went to the emergency room at St. Mary's LaFollette in December 2001 and was diagnosed with a

visceral perforation. The Complaint further alleges that she was airlifted to St. Mary's in Knoxville, where defendant performed exploratory surgery on her on December 10 and took samples, but did not perform a diverting ileostomy. She eventually lapsed into a coma, and defendant performed a second surgery on December 19, 2001, where he found a perforation and performed a colon resection and colostomy. McCulley did not improve, and died on January 13, 2002.

The Complaint alleges that plaintiffs were never told of defendant's failure to find the perforation during the first surgery, and that defendant and his staff led plaintiffs to believe that McCulley's problems were the result of substandard care by Dr. Wray.

Plaintiffs allege that they initially filed suit against Dr. Wray, and then found out during discovery in that case that Dr. Garber was responsible. They allege that Dr. Garber was negligent in his treatment of their daughter, and that his negligence caused her death.

Defendant's Answer asserts that during the first surgery, both he and another surgeon inspected the decedent's abdomen and found no perforation. He further asserted that the perforation he found during the second surgery was not present during the first surgery, and thus, he was not negligent.

Defendant then filed a Motion for Summary Judgment, alleging that plaintiffs' Complaint was filed beyond the applicable statute of limitations. He filed a Statement of Undisputed Facts, stating that the Complaint filed on May 5, 2003, alleged malpractice in the surgery he performed on December 10, 2001, some 17 months before the Complaint was filed. Defendant stated that Mr. McCulley testified in his deposition that he believed from the date of that first surgery that Dr. Garber's carelessness caused his daughter's death, and that neither the defendant nor anyone on his staff did anything to make plaintiffs believe that Dr. Wray was negligent.

Defendant attached the deposition of Mr. McCulley, wherein he testified that his wife had passed away during the pendency of this action, and that a doctor at St. Mary's LaFollette showed him his daughter's x-ray before she was airlifted to Knoxville, and told him that it showed there was a perforation in her colon. Mr. McCulley testified that after being taken to Knoxville, his daughter underwent surgery by defendant, and that defendant told him that he could not find the tear, but he "cleaned her up real good" and that she would be all right. McCulley testified that his daughter initially improved, but then worsened again, and defendant advised them that she needed a second surgery or she would die. McCulley testified the second surgery was performed by Dr. Garber on December 19, 2001, and he then told them he found the tear and fixed it. McCulley thought it was the same tear they had found in LaFollette. He stated that he could not remember defendant ever telling him anything bad about Dr. Wray. McCulley testified that after his daughter died, he obtained copies of her hospital records (he could not remember exactly when) and he delivered the records to his attorney.

McCulley testified that he always thought Dr. Garber was negligent and that his carelessness caused the daughter's death, from the time she died or even before. McCulley discussed

the fact that Dr. Garber could not find the perforation that the doctor in LaFollette saw on the x-ray, and testified that a nurse at the hospital told his niece that Dr. Wray had not administered proper treatment to his daughter, but he had no information that the nurse worked for Dr. Garber.

Defendant also attached a copy of the Complaint plaintiffs filed against Dr. Wray, and the Order of Voluntary Dismissal in that case.

Plaintiffs' unsworn Response asserted that Dr. Garber's nurse told Mrs. McCulley and their niece that Dr. Wray was negligent, that Dr. Garber told plaintiffs that the tears occurred after the first surgery, and that during discovery in the Wray lawsuit, plaintiffs discovered that Dr. Garber was not truthful about the first surgery.

Dr. Garber filed an Affidavit, asserting that none of his employees cared for Ms. McCulley nor had any contact with her family while she was in the hospital, and that all nursing personnel at the hospital were employees of St. Mary's.

The Trial Court granted defendant Summary Judgment, because the suit was filed outside the applicable statute of limitations, Tenn. Code Ann. §29-26-116, and stated in the hearing that the discovery rule would not apply because Mr. McCulley testified he thought Dr. Garber was negligent from the beginning.

Plaintiffs' issue on appeal is whether the Trial Court erred in holding that this action was barred by the statute of limitations?

The issue before this Court is reviewed *de novo* but accorded no deference to the conclusions of law made by the Trial Court. *Southern Constructors, Inc., v. Loudon County Board of Education*, 58 S.W.3d, 706, 710 (Tenn. 2001).

Plaintiffs insist that the statute of limitations is not a bar to their cause of action by virtue of the tolling provisions of Tenn. Code Ann. §29-26-116, which state:

- (a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.
- (2) In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.
- (3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

McCulley testified that he did not discover the actual injury to his daughter and the

alleged wrongful conduct by defendant that caused said injury until it was revealed in discovery in his lawsuit against Dr. Wray, which was within one year of the filing of this Complaint. However, the Trial Court ruled that the action was time-barred, because of McCulley's statement during his deposition that he believed from the time of his daughter's death that Dr. Garber's carelessness caused her death.

Tenn. R. Civ. P. 56.03 provides that summary judgment is appropriate where (1) there is no genuine issue of material fact relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn.1993); *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn.1993). The moving party has the burden of proving that it has satisfied the requirements of Rule 56.03. *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn.1991). Summary judgment should be granted only when the facts and conclusions drawn from the facts permit a reasonable person to reach only one conclusion, that the movant is entitled to judgment as a matter of law. *Staples v. CBL & Assoc.*, 15 S.W.3d 83 (Tenn. 2000).

As our Supreme Court has explained:

The statutory period of limitations in medical malpractice cases is one year after the cause of action accrues. Tenn. Code Ann. § 29-26-116(a)(1). The point in time at which the cause of action accrues is governed by § 29-26-116(a)(2), which provides that "[i]n the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." This Court has interpreted § 29-26-116(a)(2) to mean that the statute of limitations in a medical malpractice case is tolled until the plaintiff "discovered, or reasonably should have discovered, (1) the occasion, the manner, and the means by which a breach of duty occurred that produced his injuries; and (2) the identity of the defendant who breached the duty." *Foster v. Harris*, 633 S.W.2d 304 (Tenn.1982). Moreover, we have held that the discovery rule applies only in cases where the plaintiff does not discover and reasonably could not be expected to discover that he has a right of action.... the statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry.

Hoffman v. Hospital Affiliates, 652 S.W.2d 341, 344 (Tenn.1983). It is not required that the plaintiff actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a "right of action"; the plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct.

Roe v. Jefferson, 875 S.W.2d 653, 656-657 (Tenn. 1994).

Generally, the question of when a plaintiff is deemed to have constructive knowledge of the injury and its cause, and whether the plaintiff acted reasonably in trying to ascertain the cause based on the facts known to him, is a question of fact, *McIntosh v. Blanton*, 164 S.W.3d 584 (Tenn. Ct. App. 2004); *Fluri v. Fort Sanders Regional Medical Center*, 2005 WL 3038627 (Tenn. Ct. App. Nov. 14, 2005); *Matz v. Quest Diagnostics Clinical Labs., Inc.*, 2003 WL 22409452 (Tenn. Ct. App. Oct. 22, 2003).

McCulley testified that he had a subjective belief that the defendant was careless somehow and that his carelessness contributed to his daughter's death. He also testified that defendant told him that the perforations he repaired during the second surgery were not present during the first surgery. McCulley testified that Dr. Garber told him after the first surgery that he did not find a tear, and that his daughter would be fine. McCulley further stated that a nurse at the hospital told his wife and niece that it was Dr. Wray who was negligent in his treatment of the decedent. McCulley testified that he did not learn that defendant was negligent until such information came out during the discovery phase of his lawsuit against Dr. Wray.

We held in *McIntosh v. Blanton, et al.*, 164 S.W.3d 584, (Tenn. Ct. App. 2004):

Under the discovery rule, . . . the determination of when the statute of limitations begins to run requires a determination of when the plaintiff had sufficient knowledge that she had sustained an injury. . . . The inquiry does not require that the plaintiff had knowledge that a "breach" of the appropriate legal standard" had occurred. *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn. 1994). The statute of limitations begins to run when the plaintiff is "aware of the facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct," and the plaintiff knows the identity of the person who engaged in the conduct.

In this case, while the plaintiff did not know that a breach of the appropriate legal standard had occurred, the record reveals he had sufficient information to put him on notice that an injury had occurred and that the injury was caused by a wrongful act. *Id.* The information plaintiff had from the medical records at St. Mary's LaFollette and statements by third parties, established that he had sufficient knowledge that a wrong had occurred, and as a reasonable person, he would be put on inquiry.¹ *Roe*. Accordingly, we affirm the Trial Court's ruling that the statute of limitations bars

¹In his deposition, plaintiff testified that the doctor at St. Mary's in LaFollette had pointed out to plaintiff "a break or a tear" on his daughter's colon, which constituted an emergency and required that she be airlifted to Knoxville as soon as possible, and that he didn't understand why defendant did not find the tear when he performed the initial surgery.

Plaintiff testified in his deposition:

Q. Now you did understand that your wife had been told by Dr. Wray's office that it was Dr. Garber's fault?

plaintiffs' claim.

The Judgment of the Trial Court is affirmed, and the cause remanded, with the cost of the appeal assessed to William B. McCulley and Jean McCulley.

HERSCHEL PICKENS FRANKS, P.J.

A. Don't ask me where I got that, I heard that, yes. . . .

Q. Now is that based on the February 20, 03 letter from Salzburg, is that what you're talking about when you say you learned that?

A. No.

Q. What is it based on?

A. I assumed that all the time.

Q. I'm sorry?

A. I did blame Dr. Gerber for carelessness or whatever it was that caused her her life [sic].

Q. And you felt like that from when she died?

A. Yes.